

No. 42838-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KODY CHIPMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey, Judge
Cause No. 11-1-00491-4

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	13
1. While the language charging the two counts of vehicular assault did not use the word “proximate,” it is clear from the language used that the State was alleging the injuries of the victims resulted from the manner in which Chipman drove a vehicle. Further, even if the language was “inartful,” he did not suffer any prejudice from the language of the charging document.....	13
2. Chipman produced no evidence to support self-defense and it was not error for the court to refuse to instruct the jury on self-defense.....	18
3. The court was correct in excluding the evidence of a psychologist who would have testified that Chipman suffered from a generalized anxiety disorder, as well as testimony of his mother corroborating the events of his past. He did not establish that such evidence was either relevant or helpful to the jury.	31
4. The injuries to the victim of a vehicular assault can exceed the level of substantial bodily harm, and such a finding by the jury can support an exceptional sentence above the standard range.	38
D. <u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Frye v. United States</u> , 293 F. 1013, 34 A.L.R. 145 (D. C. Cir. 1923).....	35, 37
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	8

Washington Supreme Court Decisions

<u>State v. Aleshire</u> , 89 Wn.2d 67, 568 P.2d 799 (1977).....	29
<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984)	33-35, 37
<u>State v. Cardenas</u> , 129 Wn.2d 1, 914 P.2d 57 (1996).....	40-41
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1998).....	37
<u>State v. Dixon</u> , 159 Wn.2d 65, 147 P.3d 991 (2006).....	31
<u>State v. Eriksen</u> , 172 Wn.2d 506, 259 P.3d 1079 (2011)	27
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993)	33-35, 37
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991)	13, 15-17
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000)	15-16

<u>State v. Nordby,</u> 106 Wn.2d 514, 723 P.2d 1117 (1986).....	40-41
<u>State v. Riker,</u> 123 Wn.2d 351, 869 P.2d 43 (1994).....	36-37
<u>State v. Rohrich,</u> 149 Wn.2d 647, 71 P.3d 638 (2003).....	31
<u>State v. Stubbs,</u> 170 Wn.2d 117, 240 P.3d 143 (2010).....	38, 41-42
<u>State v. Walker,</u> 136 Wn.2d 767, 966 P.2d 883 (1998).....	19, 26
<u>State v. Werner,</u> 170 Wn.2d 333, 241 P.3d 410 (2010).....	19
<u>State v. Williams,</u> 162 Wn.2d 177, 170 P.3d 30 (2007).....	14, 26

Decisions Of The Court Of Appeals

<u>State v. Callahan,</u> 87 Wn. App. 925, 943 P.2d 676 (1997).....	20
<u>State v. Dyson,</u> 90 Wn. App. 433, 952 P.2d 1097 (1997).....	20, 29
<u>State v. Garcia,</u> 146 Wn. App. 821, 193 P.3d 181 (2008).....	27
<u>State v. George,</u> 161 Wn. App. 86, 249 P.3d 202 (2011).....	20, 25
<u>State v. Gogolin,</u> 45 Wn. App. 640, 727 P.2d 683 (1986).....	29
<u>State v. Hursh,</u> 77 Wn. App. 242, 890 P.2d 1066 (1995).....	14

<u>State v. Pappas</u> , 164 Wn. App. 917, 265 P.3d 948 (2011).....	41, 43
--	--------

<u>State v. Roggenkamp</u> , 115 Wn. App. 927, 64 P.3d 92 (2003)	14
---	----

Statutes and Rules

Chapter 9A.20 RCW	39-40
ER 702.....	32-33, 35
LAWS OF 2001, c. 300 § 1	40
RCW 9.94A.535.....	38
RCW 9.94A.535(3)(y)	16, 38, 42
RCW 9A.04.110.....	40
RCW 9A.04.110(4)	40-41
RCW 9A.16.020.....	20
RCW 46.61.502	39-40
RCW 46.61.502(5)	28
RCW 46.61.522	14, 39
RCW 46.61.522(1)(a).....	16
RCW 46.61.522(1)(c).....	16
RCW 9.94A.585(4)	39
Sentencing Reform Act (SRA)	41

WPIC 90.07	18
WPIC 90.08	18
WPCI 91.02	18

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the charging language of the two vehicular assault counts failed to allege a causal relationship between Chipman's driving and the injuries to the victims, and if so, whether the omission requires reversal.

2. Whether the trial court was correct when it refused to instruct the jury on self-defense.

3. Whether the court erred in excluding expert psychological evidence that Chipman suffered from a generalized anxiety disorder.

4. Whether a jury finding that the injuries suffered by the victim of a vehicular assault exceeded the level of harm required for substantial bodily harm can support an exceptional sentence above the standard range.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On March 31, 2011, Boy Scout Troop101 was preparing to hold a Court of Honor at a building on South Bay Road in Olympia that had previously been used as a fire station. RP 5, 164-65, 257.¹ The Court of Honor, scheduled to begin at 6:00 p.m., was an award ceremony, a significant event for Boy Scouts and their families. All of the Boy Scouts were in uniform. RP 258. Dylan Kitchings was to receive his Star Rank, and his entire extended

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the sequentially numbered trial transcripts from October 10 through October 17, 2011.

family was present to watch. RP 5-6, 79, 257. A potluck dinner was to follow the ceremony, and people were setting up tables with the food beforehand. RP 259. Five or six other scouts had arrived with their families and people were carrying food from the parking lot into the building; children were playing outside. RP 6-7. The old fire station was at the end of a long, two-lane private driveway, with a small parking lot. RP 8, 53, 262.

Shortly before 6:00 p.m., Dylan's father, Dan Kitchings, went outside to the parking lot. RP 8. Dan's father-in-law, Dee Cooper, had also gone outside to smoke one last cigarette before the ceremony began. RP 80. It was a warm evening, about dusk. Visibility was good. RP 10, 80. As Dan Kitchings (hereafter Kitchings) was walking across the lot with his son, a silver Subaru entered the parking lot at a speed probably exceeding 40 m.p.h., tires squealing. The driver braked hard, locking the wheels, and stopped a few feet from Kitchings. RP 10-12, 81-83. The sound of the tires squealing was loud enough that people inside the building heard it. RP 181, 188. Dee Cooper (hereafter Cooper) observed the car and walked over to it. RP 83. The car was very loud; Cooper and Kitchings could not hear the driver over the noise. RP 15, 84.

Upset because the Subaru had almost hit him and his son, Kitchings approached the car at the same time that Cooper did. RP 14-15. The driver was laughing and fidgeting back and forth. RP 13. Kitchings knocked on the driver's side window and asked him several times to roll the window down. RP 14. Cooper also knocked on the window, and the driver, later identified as Chipman, rolled it down slightly. RP 15, 56, 85. At some point he said he could not roll the window down because it was broken. RP 120. Cooper said something along the lines of "What the hell do you think you're doing"? RP 84, and Kitchings asked if he realized he'd almost hit him, and requested that he shut off the engine. RP 15. The two men found Chipman's behavior odd and were concerned that he was under the influence of something or had a medical problem. Kitchings heard him say he was late for an NA meeting and he did not respond when asked why he had pulled into the parking lot so fast. He would not make eye contact, kept his head down, his speech was slow, he constantly weaved back and forth, he appeared to be in a stupor, was inattentive, slumped over, and he would not turn off the engine. RP 16-17, 84-86, 119, 123. Cooper heard Chipman say he had just come off of the I-5 freeway, which made no sense because the fire station was four miles from

I-5. RP 84, 120. Cooper and Kitchings thought he was drunk but could not smell alcohol. RP 59, 130.

The mother of another scout, Debbie Brice, was in the parking lot at the time and also observed Chipman. She testified that he seemed confused or dazed, stared at the ceiling of the car, and did not answer Kitchings and Cooper. RP 168.

Chipman then opened the driver's door a few inches and Cooper pulled it farther open. RP 85-86, 122. Cooper leaned down, trying to look at Chipman's face, and again told him to turn off the engine. RP 86. Kitchings was squatting between the open door and the car, RP 18, and Cooper stood with his right elbow on top of the car with his left hand on the door window to open the door farther. RP 98. A scout named Tim Keese was driving into the lot with his mother at this time. He did not know any of the people involved, but saw two men inside the open door area of the car. RP 139-143. Because it was an unfamiliar car, Keese watched it closely in his rear view mirror. RP 144.

While they were trying to question Chipman, both Kitchings and Cooper heard an unidentified person say something like "Just call the cops," or "Call the police." RP 26, 87. Kitchings reached for his cell phone and immediately heard tires squeal. Chipman

said nothing, but the car accelerated backwards. RP 88. Kitchings remembered nothing more about the incident. He awoke from a coma in the hospital on April 14, 2011. RP 26. Cooper found himself under the car with the rear wheel spinning 12 inches from his head. He heard the sound of "peeling rubber." RP 87. He believes he was unconscious for some period of time. RP 88.

Tim Keese, watching in his rearview mirror, saw the car move abruptly backward without first moving forward. The driver's side door was open and hit the two men standing outside. Glass shattered and he saw the men on the ground. RP 144. Debbie Brice, also in the parking lot, saw the car drag the two men a few feet before they were slammed to the ground. RP 169. The driver of the car never got out of the car nor did he stop after the men were hit, but left the parking lot at a high rate of speed, turning right, or south, onto South Bay Road. RP 169-70.

David Valente, the father of a Boy Scout, pulled into the fire station parking lot as Cooper and Kitchings were trying to speak with Chipman. He parked in such a way he could see the car and saw the Subaru make a violent turn to the side in reverse, causing the driver's door to fly open, and run over the two men. He described the car door knocking them down and the car rolling over

at least one of them, bouncing as it did so. RP 314-318, 327. Valente chased after the Subaru and saw it stopped on South Bay Road where the driver attempted to close both the driver and passenger side doors. Valente was able to get the license number. RP 319. He followed the Subaru but it went so fast that he lost it within half to three-quarters of a mile so he turned around and went back to the old fire station. RP 321.

Misty Chastain was driving southbound on South Bay Road, approaching the driveway to the old fire station. She observed the Subaru pulling out of the driveway, the driver trying unsuccessfully to close and latch the driver's door as he drove. She thought the driver looked surprised and confused. RP 220-21. The driver's side window was open and there were dents on the driver's side. The car stopped and Chastain passed it, as did another car behind her, and then the Subaru pulled out into traffic again. It passed her and another car at a high rate of speed in a no-passing zone. Because the Subaru caught her attention she followed it. RP 221-23. Even though the Subaru was traveling faster than Chastain, it had to stop twice at stop signs because of traffic ahead of it. She lost sight of it when it turned onto Abernathy, but she followed anyway and saw it stopped in front of the Pleasant Glade

Elementary School. RP 224-26, 231-233. She saw the driver outside of the Subaru. He went to the front of the car, bent down, and looked underneath it. His actions were erratic and “amped up.” He was shaking his head and making distraught gestures, but was not using a phone or flagging down passing cars. RP 227, 234. Chastain slowed enough to get the license number, then returned to the old fire station and gave a witness statement to the police who were already there. RP 227.

After Chipman left the fire station, several people called 911. RP 145-47, 173, 246, 265, 298, 320. Brianna Cooper DeFord, Cooper’s granddaughter and Kitching’s niece, gave first aid until medical units arrived. RP 290, 302-04. The men were taken to the hospital. RP 304.

Deputy Carla Carter of the Thurston County Sheriff’s Office heard a radio report of the incident as well as the description of the vehicle and its last known location. She went to that area and spotted the Subaru, stopping it at Carpenter Road and Britton Parkway within ten minutes of hearing the call. The driver, who Carter identified as Chipman, had his arm out of the driver’s window holding the door closed. RP 412-17, 424. She observed his cheeks were sunken and he was white and pasty. He appeared

agitated, was sweating, and spoke rapidly. In spite of repeated commands to get out of the car, he persisted in reaching underneath the driver's seat. RP 418-19, 422. He focused straight ahead, not making eye contact, and the deputy had to physically remove him from the Subaru. RP 419-20. The driver's side door was bent near the window and would not close all the way. RP 422. There was a cell phone on the car seat near the center console. RP 423.

Carter placed Chipman in the back of her patrol car but did not arrest him or ask him questions. RP 423, 427. He volunteered statements including "Nothing happened," and "I made a mistake. I made a bad decision." RP 418, 427. Trooper Justin Eisfeldt of the Washington State Patrol responded. He inspected the Subaru and noticed the driver's side door and front panel had extensive damage, the window was broken out, the door wouldn't close, and there was a crease in the lower portion of the door. RP 436.

Eisfeldt arrested Chipman, but even before that he advised him of his *Miranda*² rights. RP 439. Chipman told him he had pulled into a driveway on South Bay Road, some people told him

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

he was driving too fast and they thought he was impaired and were going to call the police. He told them he was leaving and one of the people possibly hit the ground but he wasn't sure. RP 441-42. He left the scene, drove a short distance, got out of the car and checked the damage, got back in and continued on without calling law enforcement. When asked why he left he replied that he was in drug court and couldn't have any contact with law enforcement.³ RP 443-45. "My initial thought was f*** it. I will get a new window and screw them guys." He did not claim that either Kitchings or Cooper attempted to pull him out of his car or grab his keys. RP 444, 450.

Later in his contact with Trooper Eisfeldt, Chipman told the officer that the "guys scared me. They were up in my face," but he did not call the police because he did not want to deal with them. RP491. He also said, "I thought they were fine. It looked like they were getting up. I did not hit them." RP 491, Exhibit 33. Eisfeldt testified that until he said something to the effect that Chipman may have been scared, Chipman had said nothing about being frightened. RP 494. Further on in the discussion, Chipman said, "I

³ Eisfeldt conducted field sobriety tests and concluded that Chipman was not impaired, RP 435, a conclusion also reached by a drug recognition expert, RP 538, and confirmed by a blood test. RP 454-55.

shut the door, and because they were saying, well, you're drunk, yadda, yadda, yadda, and I'm not drunk. Then they grabbed onto my door—or actually, I started driving and the guy tried to open my door as I was driving.” He then indicated that he did not hear or feel anything that made him believe he had hit a person; the men fell down. RP 495-97. Eisfeldt testified that Chipman never denied that the reason he left was because he did not want contact with police, RP 501, and that in the various accounts Chipman gave of the incident, he never said that he hit the men, only that they fell down. RP 504. Chipman never said anything about being scared until Eisfeldt introduced the word into the conversation. He maintained he never heard or felt anything to indicate he hit the victims. RP 508.

Detective Ian Morhous of the Washington State patrol interviewed Chipman following his arrest. At the beginning Chipman was agitated and angry enough to use foul language. RP 365. As the interview progressed he appeared to become aware of the seriousness of the situation and became more concerned. RP 365. He told the detective he was on his way to a meeting but had some time to kill and was going out South Bay Road to look for a used car. He admitted entering the parking lot of the fire station too

fast. Words were exchanged with two people and as he was leaving two people ended up on the ground. He never called law enforcement. He was “weirded out” by the confrontation. He did not say anything about being chased. RP 366-68, 370.

Dee Cooper suffered a contusion on the right side of his head, a laceration on the back of the head, and fractures of the pelvis on the right side and a fracture of the right hip socket. RP 206-13. He lost four teeth, RP 539, and had to wear dentures thereafter. RP 248. Dan Kitchings suffered a skull fracture and severe brain damage caused by bleeding and swelling of the brain, caused in turn by a severe impact to the skull and cranium. RP 516. He was placed in a drug-induced coma for about seven days and required three surgeries to address the complications of his injury. RP 517-27. The treating neurosurgeon thought that he might die. RP 528. Kitchings has permanent brain damage, RP 530, and lasting effects to include headaches, reduced endurance, impaired ability to walk, loss of short term memory, and dizziness. He can no longer smell and his sense of taste is impaired. RP 34-37.

2. Procedure.

Chipman was tried on the second amended information charging two counts of vehicular assault, one for Cooper, Count I, and one for Kitchings, Count II, also alleging an aggravating factor that the injuries substantially exceeded the level of bodily harm necessary to satisfy the element of the offense. There was a third charge of hit and run resulting in injury, Count III. CP 11-12.

A pretrial hearing was held on October 3, 2011, to address a number of motions by both the State and the defense. Chipman sought a self-defense instruction, offering the opinion of Dr. Brett Trowbridge that he suffered from a generalized anxiety disorder and that made him more anxious than might be expected during the incident. CP 23-24. The court excluded expert testimony at trial. 10/03/11 RP 95-96. During the trial, Chipman sought to call his mother to testify that he had led an astonishingly eventful and unfortunate life. The court excluded her testimony essentially on the grounds that it was intended to corroborate the expert opinion, which was excluded on the basis that the subject matter was not beyond the common experience of the jurors. RP 381-82.

The jury found Chipman guilty of all three counts. It further found that, pertaining to both of the vehicular assault charges,

Chipman operated a motor vehicle both in a reckless manner and with disregard for the safety of others. Finally, it found that Kitchings' injuries exceeded the level of bodily harm necessary to constitute substantial bodily harm. RP 659-60, CP 85-90. He was sentenced to the top of the standard range for Counts I and III, 20 and 29 months, respectively, and to an exceptional sentence of 40 months on Count II, the vehicular assault on Kitchings. RP 94-103.

C. ARGUMENT.

1. While the language charging the two counts of vehicular assault did not use the word "proximate," it is clear from the language used that the State was alleging the injuries of the victims resulted from the manner in which Chipman drove a vehicle. Further, even if the language was "inartful," he did not suffer any prejudice from the language of the charging document.

The fundamental purpose of a charging document is to inform a defendant of the charge so that he is able to prepare a defense. A charging document is sufficient if it is fair to the defendant to require him to prepare his defense based on that language. State v. Kjorsvik, 117 Wn.2d 93, 110, 812 P.2d 86 (1991). All essential elements of an offense must be contained in the charging language, including non-statutory court imposed elements. Id. at 101-02. A challenge to the sufficiency of a

charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

The elements of vehicular assault are set forth in RCW 46.61.522. Those elements that apply to Chipman's case are:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

.....

(c) With disregard for the safety of others and causes substantial bodily harm to another.⁴

The Washington Court of Appeals and Supreme Court have "engrafted" onto the vehicular homicide statute an element of proximate cause between a defendant's alcohol consumption and the victim's death. That causal relationship also applies to vehicular assault. State v. Hursh, 77 Wn. App. 242, 246 n. 2, 890 P.2d 1066 (1995).⁵ The alternative means of committing vehicular assault and vehicular homicide are the same, and the case law construing one applies to the other. State v. Roggenkamp, 115 Wn. App. 927, 935, 64 P.3d 92 (2003). The State does not dispute that a causal relationship between the driving and the injury is an essential element of the offense of vehicular assault. However, the

⁴ This statute was amended in 2001 to change the language from "is the proximate cause of serious bodily injury" to "causes substantial bodily harm." LAWS OF 2001, c. 300 § 1.

⁵ This case was obviously addressing the pre-2001 version of RCW 46.61.522.

language of the statute no longer uses the word “proximate” and Chipman’s argument does not explain why the language of the charging document is insufficient to make that connection apparent.

Chipman did not challenge the information in the trial court. In Kjorsvik, the Supreme Court adopted the federal standard of construction when a charging document is challenged for the first time on appeal. Kjorsvik, 117 Wn.2d at 105. There are two prongs to the analysis: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. Id. at 105-06. A charging document that is challenged for the first time on appeal will be construed liberally in favor of its validity and will be found sufficient if the necessary elements of the offense appear in any form, or by fair construction may be found, on the face of the document. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Viewed in this way, the charging document will be held to include all facts which are necessarily implied by the language of the allegations. See Kjorsvik, 117 Wn.2d at 109. The exact words of an element established by case law need not be used. Id. Provided that the necessary elements appear in some form on the

face of the document, a defendant can succeed in challenging the sufficiency of the information only where he was “actually prejudiced by the inartful language” of the charges. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 103, 106 (noting that a liberal construction and requirement of actual prejudice would prevent defendants from “sandbagging,” or challenging an information only after defects could no longer be remedied).

In determining whether a defendant suffered actual prejudice as a result of a charging document's lack of specificity, a court is permitted to look outside the document itself. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007) (in that case the statement of probable cause).

The charging document here charged Chipman with:

COUNT I – VEHICULAR ASSAULT, RCW 46.61.522(1)(a) or (c)—CLASS B FELONY: In that the defendant, KODY MICHAEL CHIPMAN, in the State of Washington, on or about March 31, 2011, did operate or drive a motor vehicle in a reckless manner and/or with disregard for the safety of others; and caused substantial bodily harm to Dee Cooper.

COUNT II – VEHICULAR ASSAULT, RCW 46.61.522(1)(a) or (c) and RCW 9.94A.535(3)(y)—CLASS B FELONY: In that the defendant, KODY MICHAEL CHIPMAN, on or about March 31, 2011, did operate or drive a vehicle in a reckless manner and/or with disregard for the safety of others; and caused substantial bodily harm to Daniel Kitchings. It

is further alleged that the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

CP 11.

In Chipman's case, a commonsense reading of the charging language, read as a whole, contains all of the elements of vehicular assault. The only word left out is "proximately." The manner of driving is followed by "caused substantial bodily harm." Nothing in the language even suggests that the harm can be caused by anything other than the driving. "By fair construction," Kjorsvik, 117 Wn.2d at 105-06, the necessary elements can be found in the second amended information.

Since that is the case, the question becomes whether Chipman can demonstrate that he was prejudiced by the "inartful" language of the charging document. He does not argue that he was, but rather that prejudice is presumed. Appellant's Opening Brief at 12. That is not the case, per the authorities cited above.

There is substantial evidence in the record that Chipman was aware of the court-created element of proximate cause. First, his self-defense argument makes no sense unless he understood he was charged with injuring the victims as a result of his driving. The pretrial hearing held on October 3, 2011, dealt extensively with

Chipman's attempt to get a claim of self defense before the jury. 10/03/11 RP 64-89. His claim essentially was that if he hit the victims, it was because he was defending himself, and the only way the victims could have been hit was by the car he was driving.

Second, Chipman's proposed jury instructions demonstrate that he was aware of the proximate cause element—he proposed instructions regarding it. Supp. CP____, WPIC 90.07, 90.08, and 91.02. Defense counsel had practiced law for more than 30 years. 10/03/11 RP 38, 61. He did not challenge the charging document below, which indicates that he found it sufficient, and the record shows that he vigorously defended Chipman. Prejudice is not presumed when a charging document is challenged for the first time on appeal, and no prejudice has been demonstrated.

2. Chipman produced no evidence to support self-defense and it was not error for the court to refuse to instruct the jury on self-defense.

Chipman wanted to argue to the jury that he was defending himself when the victims were injured. He further sought to introduce the testimony of Dr. Trowbridge, a psychologist who opined that Chipman suffered from a generalized anxiety disorder which caused him to be more anxious than a normal person would be. CP 23-24. The matter was addressed at a pretrial hearing on

October 3, 2011, and the court heard lengthy argument. 10/03/11 RP 64-95. The court ruled that the expert testimony was not admissible, on the ground that generalized anxiety disorder had not been recognized in Washington as a basis for making a person's behavior less culpable and it would not assist the jury. 10/03/11 RP 95-98. The court did not close the door on self-defense, waiting to see what the evidence presented at trial would be. 10/03/11 RP 97. At the end of the trial, the court declined to instruct the jury on self-defense.

I guess self-defense is really the main issue, as to whether there was going to be any instruction on it, and without the defendant's testimony, I am definitely not planning to give it. And it was—that was my basic plan even should he testify, but I was going to wait to hear his testimony.

RP 543.

A defendant is entitled to jury instructions explaining his theory of the case if the evidence supports such instructions. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). If a trial court refused to give a requested jury instruction based upon a factual dispute, that ruling is reviewed for abuse of discretion. If the refusal is based on a ruling of law, the review is de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

The lawful use of force is addressed in RCW 9A.16.020, which reads in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

The defendant has the “low burden” of presenting “some evidence” of self-defense. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). The evidence must be credible. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). There must be evidence that “(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; . . . (3) the defendant exercised no greater force than was reasonably necessary, . . . and (4) the defendant was not the aggressor. . . .” In addition, there must be evidence that the defendant intentionally used force. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) (internal cites omitted).

Chipman failed to provide evidence to satisfy any of these elements.

Chipman argues that he was afraid of the victims because they were loud, one was large, and they told him he wasn't going anywhere. Appellant's Opening Brief at 16. The evidence does not support a conclusion that he was subjectively afraid. When Chipman first screeched to a stop in front of Kitchings, Kitchings testified that he was laughing. RP 12. His behavior made Kitchings believe he was impaired. RP 16. Kitchings told Chipman he was at a Boy Scout meeting and Dee Cooper, once the car door was open, asked Chipman if he realized he'd almost hit someone. RP 15. Chipman refused to turn off the car as requested, said something about being late for an NA meeting, refused to make eye contact, and spoke slowly. RP 17. Kitchings denied telling Chipman he could not leave and testified he would not have stopped him if he had said he wanted to leave. RP 65. Immediately after someone in the crowd said to call the police, Kitchings reached for his cell phone and Chipman accelerated backwards without warning, knocking Kitchings to the ground. RP 17, 26, 58, 74.

Dee Cooper testified that he knocked on Chipman's car window and said something like "What the hell do you think you're doing?" Chipman replied that he'd just come off of I-5. RP 84, 120. Chipman was told to roll down his window, and he did get it down less than an inch. RP 84, 120. He persisted in looking down at the floorboards and was slumped over. Cooper also thought there was something physically wrong with him. RP 84-85, 123. He appeared to be in a stupor—he would not raise his head or make eye contact. RP 86. Chipman opened his door as much as two feet and Cooper opened it farther. RP 85, 122. He told Chipman to turn off the key. He also denied telling Chipman that he wasn't going to be allowed to leave. RP 87, 123, 125. Cooper testified that almost immediately after someone said to call the police, the car accelerated backwards. Cooper was knocked down and run over. RP 87. Kitchings and Cooper were the only people who approached Chipman. RP 124.

Debbie Brice testified that Chipman looked dazed and confused, possibly intoxicated, staring at the ceiling of his car and not responding to Cooper and Kitchings. RP 168-69, 178-79. She heard the men asking Chipman to get out of the car. RP 178.

Linda Cooper saw Kitchings and Cooper approach Chipman's car. She heard Cooper ask Chipman what he was doing and say something about kids being all around. Kitchings asked Chipman if he was all right, but Chipman was unresponsive and did not make eye contact. RP 243-44.

Chipman did not testify at trial, and his version of the encounter came in only through his statements to police officers in the hours after the incident. Trooper Eisfeldt responded to contact Chipman after Deputy Carter had stopped his vehicle. RP 431. Chipman was excessively nervous, slightly evasive, and minimized his involvement in the incident. He did not appear to be afraid. RP 434-35, 451. Initially, Chipman told Eisfeldt that he had pulled into a driveway on South Bay Road, some people told him he was driving too fast and they thought he was impaired. He opened his door because the window would not roll down. One of the men grabbed the door handle of his car. When they said they were going to call the police, he told them he was leaving and he did. One of the guys held onto the door, the door slammed and the guy fell down. Chipman said he did not call law enforcement. RP 441-43, 445, 450. He did not claim that either man tried to pull him out of his car or grab his keys. He said nothing about being chased.

He said, "My initial thought was f*** it. I will get a new window and screw them guys." RP 444, 450. When asked why he left the scene he said that he was in drug court and he was not to have contact with any law enforcement officers. RP 445, 450. During the time he was with Trooper Eisfeldt, he expressed concern about his vehicle because the lights were on and he didn't want his battery to go dead, he was afraid he was going to lose his job, and he just wanted to live his life. RP 450-51.

Chipman denied hitting the victims.⁶ "I thought they were fine. It looked like they were getting up. I did not hit them." RP 491, 493. Only after Trooper Eisfeldt, who was inquiring about why Chipman did not call law enforcement after he left the scene, said he could understand if Chipman was scared, did Chipman say that he was. RP 492, 494. Chipman then said that the guys were up in his face and scared him. RP 491. He didn't want to deal with law enforcement so he didn't call. RP 491-92.

Chipman also said that he started driving before "the guy" tried to open his door. The men both fell down. He never heard or felt anything to indicate he had struck the men. RP 495, 497. He

⁶ Although Chipman told Deputy Carter that his door had hit at least one person, RP 423, he consistently denied thereafter that he had hit anyone. RP 504.

said the men told him he couldn't leave but he told them he was going to. RP 499.

Chipman never claimed to be afraid of the victims until Trooper Eisfeldt handed him the word "scared." He did not behave like a person afraid of the men. He told Dr. Trowbridge, during the psychologist's examination, that he "kind of yelled back" at the victims. "He said, 'I'm not drunk. I wasn't speeding. . . .I'm leaving.'" CP 41 at 48. He did act like a person afraid of getting into trouble, and it was only after he heard somebody say to call the police that he left, and he left immediately. But to claim self-defense, a person must be in fear of injury or some offense against someone's person or property. Fear of getting into legal trouble is not sufficient. And the force used must be only what is necessary. Here Chipman clearly had the advantage. He was in a car and the victims were on foot, and he obviously knew that they could not prevent him from leaving. He did leave.

Self-defense has both a subjective and objective aspect. To determine whether a defendant has produced sufficient evidence that he was in good faith in fear of imminent danger, the court must view his actions in light of the facts and circumstances known to him. State v. George, 161 Wn. App. 86, 96-97, 249 P.3d 202

(2011); Walker, 136 Wn.2d at 767. The facts and circumstances as put before the trial court did not show that he was actually afraid of the victims.

The objective aspect of self-defense requires the court to determine what a reasonable person in that situation would have done. Threat of imminent harm does not have to be real, if a reasonable person would have believed that it was. “The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant’s subjective beliefs would always justify the homicide.” Walker, 136 Wn.2d at 767.

No reasonable person in Chipman’s position would have been in fear of imminent harm. It was daylight. RP 260. There were a number of people around in the parking lot. RP 7. Many of them would have been children, and many would have been in Boy Scout uniforms. It is unlikely that two men, one of them an older man, would haul Chipman bodily out of his car and beat him up in the presence of numerous witnesses, including children. They might yell at him, but that is not bodily harm. They might try to take his car keys, but that is not malicious interference with his personal property. Someone said to call the police and Kitchings reached for

his cell phone, so even if he were frightened for his physical safety, a reasonable person would have known that help was on the way. Instead, it was the mention of the police that immediately preceded his flight, he did not call law enforcement once he was away from the scene, and he made it clear that he had no intention of doing so.

Chipman suggests that he was in fear of being unlawfully restrained by Cooper and Kitchings, that they were going to hold him against his will and falsely accuse him of something, presumably driving while under the influence of drugs or alcohol. Appellant's Opening Brief at 16. He does not explain how, even if the victims did keep him at the scene until police arrived, that would be an offense. The two victims made it clear they believed he was somehow impaired, whether chemically or because of illness, and that he was unsafe to drive. A private person has the right to arrest someone for a misdemeanor committed in his or her presence if it constitutes a breach of the peace. State v. Garcia, 146 Wn. App. 821, 829, 193 P.3d 181 (2008). A breach of the peace is defined in as "a public offense . . . causing or likely to cause an immediate disturbance of public order." State v. Eriksen, 172 Wn.2d 506, 517, 259 P.3d 1079 (2011) (Alexander, J., dissenting). Driving under the

influence carries the potential for injury or death and constitutes a disturbance of the public order. Id. It is also a gross misdemeanor. RCW 46.61.502(5). Here the victims were attempting to protect the people in the parking lot from Chipman's dangerous driving, and would have been within their rights to detain him for the police, although as noted above both denied that they would have prevented him from leaving.

Chipman also used far more force than was necessary to leave. The very nature of the injuries to the victims shows that Chipman had to have been moving at a considerable speed. Kitchings heard the tires squeal. RP 26, 87. The car accelerated backwards so fast that at least one wheel was spinning. RP 87. Cooper was struck and went under the car. RP 87. Both men were dragged a few feet and the car was moving fast. RP 169. The men rolled underneath the car, which had made a violent turn and then left, driving very fast. RP 317-320. If Chipman had truly been frightened and just wanted to get away, he could have simply eased the car back until the men got out of the way. Or he could have used the cell phone that was on the seat beside him and called 911. RP 423.

A person who is the aggressor cannot claim self-defense when his aggression is met with resistance. Here Chipman was arguably the aggressor when he sped into the parking lot of the old fire station and skidded to a stop within a few feet of pedestrians.

The main reason, however, that the court ruled against Chipman's self-defense instructions is that he denied ever hitting anyone. RP 491, 493, 495, 497. "When a defendant claims a victim's injuries were the result of accident rather than caused by the defendant's acts, the defendant cannot claim self-defense." State v. Dyson, 90 Wn. App. at 439, citing to State v. Gogolin, 45 Wn. App. 640, 643-44, 727 P.2d 683 (1986). "One cannot deny that he struck someone and then claim he struck them in self-defense." State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977). If the evidence does not provide a basis for the instruction, it need not be given. Id. It is not sufficient to maintain that while he drove away in self defense, the victims simply fell down. In that case he would not be guilty of vehicular assault because he didn't hit them, not because he hit them in self-defense.

Chipman further argues that the court applied the wrong legal standard and refused to give the instruction because Chipman did not testify. That misconstrues the court's ruling. At the pretrial

hearing the court had reserved ruling on the self-defense issue until it heard the evidence at trial. Once the trial was concluded, the court said it probably wasn't going to give it anyway, but definitely would not without the defendant's testimony. The context of the ruling makes it obvious that the court did not say that the defendant had to testify to be entitled to a self-defense instruction. The defendant was the only person left who could provide a basis for the instruction, and since he chose not to take the stand, he was not going to do so. The meaning of the court's ruling was simply that Chipman had not produced the "some evidence"⁷ necessary to be entitled to the instruction.

The court's decision was based on the facts, not the law. There was no real dispute at trial about the law pertaining to self-defense, and there isn't on appeal. The dispute is about whether the facts meet the requirements of the law of self-defense, and they do not. Because the ruling was based on the evidence, the court's ruling is reviewed for an abuse of discretion. A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or

⁷ The defendant has the burden of producing "some evidence" of self-defense, but he need not produce enough to raise a reasonable doubt in the jurors' minds. State v. Adams, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982).

for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” *Id.*

The court did not abuse its discretion.

3. The court was correct in excluding the evidence of a psychologist who would have testified that Chipman suffered from a generalized anxiety disorder, as well as testimony of his mother corroborating the events of his past. He did not establish that such evidence was either relevant or helpful to the jury.

a. Dr. Brett Trowbridge.

As Chipman acknowledged during the pretrial hearings, and concedes on appeal, his proposed expert testimony was relevant only to his claim of self-defense. 10/03/11 RP 64, Appellant’s Opening Brief at 21. Because, as argued in the preceding section, Chipman was not entitled to present a defense of self-defense, the court’s ruling prohibiting expert testimony about Generalized

Anxiety Disorder (GAD) was correct. The testimony was not relevant to any issue before the jury. ER 702. Even if Chipman had been allowed to argue self-defense, testimony about GAD would not have been admissible.

Chipman wanted to call Dr. Brett Trowbridge, a psychologist, to testify that he suffers from GAD. By way of an offer of proof, he filed a copy of the transcript of the State's interview with Dr. Trowbridge, CP 28-48, and a letter from Dr. Trowbridge containing his diagnosis. CP 23-24. Dr. Trowbridge could not conclude that Chipman suffered from Post Traumatic Stress Disorder (PTSD), but diagnosed a generalized anxiety disorder, "which just means that he's a generally anxious person who has a lot of anxiety symptoms." CP 33 at 17, CP 41 at 46, CP 42 at 50-51. "He's just generally scared and mistrustful of people." CP 34 at 18. "Just fearful in general." CP 34 at 19. Although Chipman had endured a number of traumatic events in his young life, Dr. Trowbridge could not say that those caused the GAD. CP 34-36 at 20-29. Interestingly, Dr. Trowbridge did not believe that the GAD diagnosis was necessary to a self-defense argument. CP 39 at 39.

Chipman argues that Washington courts have approved expert testimony to help explain a defendant's self-defense claim.

Appellant's Opening Brief at 22. That is true. But in the cases he cites to, State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984), and State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993), the situation was much different.

In Allery, the defendant had shot her husband to death after years of physical, mental, and emotional abuse. At the time she shot him, he was lying on a couch, after he had threatened her but not made any move to assault her. She was convicted of second degree murder after the trial court excluded expert testimony about battered woman syndrome. The jury was given a limited instruction on self-defense. Allery, 101 Wn.2d at 592-93. The court discussed ER 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Allery court held that expert testimony about battered woman syndrome was admissible under ER 702.

We find that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a

phenomenon not within the competence of an ordinary lay person.

Allery, 101 Wn.2d at 597.

In Janes, the defendant shot and killed his stepfather as the latter entered the front door of their home after work. There had been a long history of abuse, both physical and mental, by the victim against not only Janes, but his mother and brother. Janes admitted to intentionally killing the victim but argued self-defense and sought to offer the testimony of a psychiatrist that he suffered from PTSD. Janes, 121 Wn.2d at 223-227. The trial court denied his self-defense instruction but did permit a diminished capacity instruction and allowed expert testimony about PTSD. Id. at 227-28. Janes was convicted of second degree murder, as well as two counts of second degree assault.⁸ The Court of Appeals reversed, holding that it was error to fail to instruct the jury on self-defense. The Supreme Court remanded to the trial court for reconsideration of the self-defense decision. If the trial court found that there was evidence to support a self-defense instruction, Janes would get a new trial and if not, the conviction would stand. The trial court was

⁸ After killing his stepfather, Janes set the house alarm system to summon police, fire, and medical units, and when the police arrived he fired at them as well as firing random shots. A police officer and a passerby were wounded. Allery, 121 Wn.2d at 225.

to consider this decision in light of the principles the Supreme Court articulated regarding battered child syndrome. Id. at 242.

The Janes court found that battered child syndrome is the equivalent of battered woman syndrome and was admissible under Frye.⁹ The courts look for acceptance of “novel scientific evidence” in the appropriate scientific community. Id. at 232-33. As in Allery, the court also found that the expert testimony met the requirement of ER 702 that it be helpful to the jury. Id. at 236. The question the lower court was to decide, then, is whether Janes had produced sufficient evidence of self-defense to entitle him to the instruction, and if he did, then the expert testimony became relevant. The existence of the battered child syndrome alone was not enough to establish that Janes’ belief that harm was imminent was reasonable. “In short, the existence of the battered child syndrome does not eliminate the defendant’s need to provide some evidence that his or her belief in imminent danger was reasonable at the time of the homicide.” Id. at 241.

Neither of these cases supports Chipman’s theory that evidence of his GAD was proof that his alleged fear of the victims was reasonable. Nor do they support his contention that Dr.

⁹ Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D. C. Cir. 1923)

Trowbridge's testimony would have been helpful to the jury. It is intuitive that most jurors are not nor ever have been battered women or children. The psychological effects resulting from that sort of abuse would be beyond their experience. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). But anxiety is not. Everybody has been anxious, and at some time everybody has been very anxious. It is not beyond common experience to imagine how a reasonable anxious person would react in the circumstances in which Chipman found himself.

In Riker, the defendant sold cocaine to an undercover police officer and confidential informant three separate times. Her defense was duress: she suffered from battered woman syndrome, the confidential informant had bullied her into selling him the drug, and because of her background she was unable to withstand the pressure exerted by the informant. The trial court excluded her offered expert testimony about battered woman syndrome, and the Supreme Court affirmed. That court held that because the battered woman syndrome might explain a person's actions within the abusive relationship, it did not explain it outside of that relationship. Riker, 123 Wn.2d at 359. "Scientific validity for one purpose is not necessarily validity for other, unrelated purposes." Id. at 360. In

fact, there was no showing of validity for that purpose under Frye. Id. at 363. Riker claimed that her history created a “patina of fear” which left her unable to resist coercion. Id. She did not establish that the claimed psychological disorder was relevant in that situation. Nor did Chipman establish that his “patina of fear” caused him to respond to confrontations with people affronted by his bad driving by fleeing recklessly.

Indeed, Chipman produced no evidence at all that GAD meets the Frye test. The courts have consistently required that evidence of psychological conditions so novel that they require an explanation to the jury meet the Frye standard. Riker, 123 Wn.2d at 363; Allery, 101 Wn.2d at 596 (Allery does not refer to Frye, but discusses the same standard); Janes, 121 Wn.2d at 235; State v. Ciskie, 110 Wn.2d 263, 271, 751 P.2d 1165 (1998). The State has been unable to locate any Washington case permitting expert testimony regarding GAD as a defense against anything.

b. Chrystal D. Chipman.

Chipman wanted his mother to testify about the many terrible things that had happened to him. CP 49-53. However, the only relevance of that testimony would be to corroborate Dr. Trowbridge’s diagnosis of GAD, which, as argued above, was

relevant only to self-defense. Since that defense was not available to Chipman, the exclusion of his mother's testimony was not error.

4. The injuries to the victim of a vehicular assault can exceed the level of substantial bodily harm, and such a finding by the jury can support an exceptional sentence above the standard range.

A court must impose a standard range sentence unless it finds substantial and compelling reasons to go outside that range. RCW 9.94A.535. The statute goes on to list factors the court may consider without jury findings and factors which the court may consider only if a jury makes a finding that they exist. In the latter category is RCW 9.94A.535(3)(y), that the victim's injuries "substantially exceed the level of bodily harm necessary to satisfy the elements of the offense."

An appellate court reviews the legal justification for an exceptional sentence de novo, and the jury's finding of the aggravating factor under a sufficiency of the evidence standard. State v. Stubbs, 170 Wn.2d 117, 123-24, 240 P.3d 143 (2010). An exceptional sentence may be reversed only if the reviewing court finds either (1) that the judge's reasons are not supported by the record or that those reasons do not justify an exceptional sentence,

or (2) that the sentence imposed was clearly excessive or too lenient. RCW 9.94A.585(4), Stubbs, 170 Wn.2d at 123.

Chipman asserts that the substantial bodily harm which is an element of vehicular assault comprises everything between temporary but substantial disfigurement and death, and thus the injuries to Dan Kitchings cannot substantially exceed the level of harm necessary to constitute the offense of vehicular assault. His argument is incorrect because it is based upon two statutes which have been amended since the decisions in the cases on which he relies.

RCW 46.61.522, defining vehicular assault, was amended in 2001. Before the amendment, it read:

- (1) A person is guilty of vehicular assault if he operates or drives any vehicle:
 - (a) In a reckless manner and this conduct is the proximate cause of serious bodily injury to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.
- (2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.
- (3) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

After the amendments, the statute reads as follows:

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
 - a) In a reckless manner, and causes substantial bodily harm to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
 - (c) With disregard for the safety of others and causes substantial bodily harm to another.
- (2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.
- (3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

LAWS OF 2001, c. 300 § 1.

RCW 9A.04.110(4) defines three levels of injury:

- (a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
- (b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;
- (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

Chipman relies on State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), and State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996), to support his argument that any injury short of death is

included in the category of “substantial bodily harm,” even though he acknowledges that at the time those cases were decided the statute required “serious bodily injury.” However, RCW 9A.04.110(4) makes it clear that bodily harm can be more serious than substantial bodily harm. “‘Great bodily harm’, then, encompasses the most serious injuries short of death.” State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). Where the victim of a vehicular assault suffered injuries that satisfy the definition of “great bodily harm,” the aggravating factor found by the jury exists.

Further, at the time Nordby and Cardenas were decided, the standard now articulated in RCW 9A.04.030(3)(y), set forth above, was different. Before 2005, the rule was that injuries could justify an exceptional sentence only when those injuries were “greater than that contemplated by the Legislature in setting the standard range.” State v. Pappas, 164 Wn. App. 917, 920, 265 P.3d 948 (2011), citing to Cardenas, 129 Wn.2d at 6. In 2005 the legislature amended the Sentencing Reform Act (SRA) to codify the aggravating factors that could support an exceptional sentence, and one of those factors is that the injuries “substantially exceed the level of bodily harm necessary to satisfy the elements of the

offense. RCW 9.94A.535(3)(y); Pappas, 164 Wn. App. at 920.

The court in Stubbs recognized this change:

The statute in question, however, RCW 9.94A.535(3)(y), creates a somewhat different test than we have employed in the past. Instead of looking at the bodily harm element of the offense to see if the victim's injuries fit within the definition of that element, the statute asks the jury to find that "[t]he victim's injuries substantially exceed the level of bodily harm *necessary* to satisfy the *elements* of the offense." . . . In other words, it directs the trier of fact to measure the victim's actual injuries against the minimum injury that would satisfy the definition of, in this case, "great bodily harm" to see if they "substantially exceed" that benchmark. As we have seen, no injury can exceed the definition of "great bodily harm." The question, then, is whether injuries that fall *within* that definition are, nevertheless, so much worse than what is *necessary* to satisfy that element that they can be said not only to exceed but to *substantially* exceed that minimum.

Stubbs, 170 Wn.2d at 128-29, emphasis in original. The Stubbs court found that the "substantially exceeds" standard is met when the injuries "leap" from "bodily harm" to "substantial bodily harm," and from "substantial bodily harm" to "great bodily harm." Id. at 130.

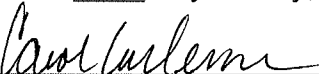
In this case, Kitchings injuries met the definition of great bodily harm. Chipman does not dispute the severity of the injuries. Since vehicular assault only requires substantial bodily harm, his injuries do substantially exceed those injuries necessary to satisfy

the elements of the offense. In Pappas, the defendant was convicted of vehicular assault and the jury made a finding that the injuries substantially exceeded the harm necessary for that crime, and the court imposed an exceptional sentence. The victim in that case was thrown from the back of a motorcycle and suffered a severe brain injury. Pappas raised the same arguments as Chipman raises, but the Pappas court affirmed the exceptional sentence. This court should likewise affirm Chipman's exceptional sentence.

D. CONCLUSION.

None of the claims raised by Chipman have merit. Based on the arguments and authorities above, the State respectfully asks this court to affirm his convictions and his exceptional sentence.

Respectfully submitted this 27th day of July, 2012.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

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